(5)

No. 95-809

In The

Supreme Court of the United States

October Term, 1995

LOCKHEED CORPORATION, *et al.*,

Petitioners,

v.

PAUL L. SPINK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Lockheed Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents over 215,000 businesses and professional organizations, as well as several thousand state and local chambers of commerce, and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases pending or recently decided in this Court: *Varity Corp. v. Howe*, 115 S. Ct. 179 (1995), *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), *District of Columbia v. The Greater Washington Board of Trade*, ___ U.S. ___, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, ___ U.S. ___, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. In particular, they have a substantial interest in ensuring that the statute is interpreted and applied in a uniform and consistent manner across the nation, because many of these plans cover participants and beneficiaries in multiple states.

The misguided decision below, which throws into doubt the validity of most amendments to pension plans covered by ERISA and imposes retroactive liability on those which took advantage of lawful provisions of ERISA as originally enacted, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive and prospective liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans.

We believe this Court's review is urgently needed. In terms of the breadth and seriousness of the impact – not just on employers but also on the federal judiciary – the first question presented in this case paints much the same picture as *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), in which the Court granted the Chamber's motion for leave to participate *amicus curiae*.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the

consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether contrary to the holdings of nine other circuits, the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan.

2. Whether the Ninth Circuit correctly held that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA"), applies retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation, in the absence of any clear intent by Congress to impose retroactive liability for pension benefits.

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INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. As to the first question presented, the decision below is not only wrong and in conflict with the decisions of other courts of appeal. The nature of the error is to replace a bright line test with a judgment of degree that casts doubt over the validity of most, if not all, amendments to pension plans, both retroactively and prospectively, and invites needless, costly litigation in the federal courts over the validity of individual amendments.

In the prohibited transaction provisions of ERISA, Congress decreed absolute prohibition, without consideration of any mitigating factors, reasoning that a test involving judgment would leave employers and plan administrators to guess at the consequences of their actions and would enmesh the federal courts in endless litigation over individual transactions. By the use of definitions, however, and drawing on the common law of trusts, Congress made clear that traditional "settlor" functions, such as designing, amending and deciding to terminate a plan, were off limits from the fiduciary rules (including the prohibited transaction rules). This demarcation is absolutely necessary, since settlor functions (where the settlor is expected to act in its own best interest) are inherently incompatible with fiduciary rules (where the fiduciary must act solely in the interest of the participants in the plan).

The decision below ignores the demarcation between settlor and fiduciary functions, holding that the settlor function of amending a plan *is* subject to the fiduciary

rules, including the prohibited transaction rules. But the worst of the problem comes next. Implicitly recognizing that the prohibited transaction rules would make it impossible to perform settlor functions, the decision below is forced to abandon the bright line test for prohibited transactions that Congress established in ERISA and make up a new test, a judgment of degree: transactions are prohibited depending on whether the benefit to the employer is more than "incidental."

Replacing a bright line test with a judgment of degree visits on employers and plan administrators the very burdens that Congress sought to avoid in establishing the bright line test. It casts into doubt the validity of most amendments previously made to pension plans and leaves employers quite uncertain about the validity of future plan amendments. It leaves plan administrators uncertain about the terms of the plans they administer. And it enmeshes the federal courts in deciding the validity of countless individual plan amendments, whether in an action by employees to invalidate an unfavorable amendment or by the plan administrator seeking to settle the terms of the plan. In this regard, the decision below carries much the same effects as the court of appeals decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), and makes an equally compelling case for this Court's review.

II. As to the second question presented, the nature of the error is not just to impose a marginal increase in liability on pension plans. By applying the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86") retroactively, the decision below has a multiplier effect that will impose on pension plans very significant liabilities – potentially over a billion dollars – beyond the burden that Congress intended to place upon them.

There is no disagreement over the fact that, in ERISA, Congress expressly permitted pension plans to exclude employees hired within 5 years before normal retirement age (*i.e.*, before age 60 in the typical plan). There is no doubt that in OBRA '86, Congress reversed itself and forbade the exclusion. The question is whether the reversal requires that such employees participate prospectively, receiving pensions based on their service after OBRA '86 or, as the court of appeals held, requires that such employees be treated as having participated retroactively from their date of hire.

The multiplier effect comes from the fact that pensions are typically based on the number of years of participation in the plan. If an older employee begins to participate after OBRA '86, he may accrue a benefit based on just a few years of service and therefore impose a modest new liability on the plan. If he must be given retroactive credit for service from his date of hire (before OBRA '86), the effect can easily triple or quadruple his pension and therefore triple or quadruple the funding burden on the plan. When the effect is multiplied across the universe of pension plans and the number of affected employees, the liability imposed on plans by the decision below might reach $1.7 billion – a liability never intended by Congress that may, ironically, lead to the reduction or elimination of pension plans.

ARGUMENT

I. AS TO THE FIRST QUESTION PRESENTED, MORE THAN BEING WRONG AND CREATING A CONFLICT AMONG THE CIRCUITS, THE DECISION BELOW REPLACES A BRIGHT LINE TEST WITH A JUDGMENT OF DEGREE, VISITING ENORMOUS, UNINTENDED AND UNNECESSARY COSTS ON EMPLOYERS, PLANS AND THE FEDERAL JUDICIARY.

The petition for *certiorari* clearly establishes the conflict among the circuits on the first question presented, persuasively demonstrates the error of the decision below, and shows the importance of the error. In this brief, the Chamber would like to underline and expand on the importance of the error by describing its broad and deleterious effect on pension plans and their sponsors, as well as on the federal courts.

The nature of the error is the key to its effects. In ERISA, Congress carefully defined who is a fiduciary and then flatly prohibited a fiduciary from causing an employee benefit plan to engage in a well-defined list of prohibited transactions. ERISA section 406(a), 29 U.S.C. § 1106(a). Among the prohibited transactions are transactions in which the assets of the plan are used for the benefit of a party in interest, such as the employer who sponsors the plan.[1] Thus, a "fiduciary" may not cause a

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[1] In pertinent part, section 406(a) of ERISA provides:

> A *fiduciary* with respect to a plan shall not cause the plan to engage in a *transaction*, if he knows or should know that such transaction constitutes a direct or indirect –
>
> (D) transfer to, or use by or for the benefit of, a *party in interest* of any assets of the plan . . .

29 U.S.C. § 1106(a) (emphasis added).

plan to engage in a "transaction" in which the assets of the plan are used for the benefit of a "party in interest."

Congress deliberately made the prohibition absolute, without regard to the motives of the fiduciary or the effect on the participants in the plan or any other consideration whatsoever, so as to create a bright line. Congress understood very well that a flat prohibition would bar not only abusive transactions but also some innocuous transactions. It decided, however, that the advantages of a bright line outweighed the disadvantages. The advantages, of course, were letting sponsors and administrators of plans know in advance what was impermissible (without exposing themselves to personal liability through trial and error) and removing the need for decades of federal litigation to refine the rules.[2]

At the same time, there are a number of functions commonly (and properly) performed with respect to employee benefit plans that simply could not be performed if they were subject to the fiduciary rules of ERISA, including the prohibited transaction rules. Foremost among them are (1) designing and establishing an employee benefit plan, (2) amending an employee benefit plan, and (3) deciding to terminate an employee benefit plan. As explained below, an employer almost always acts in its own self-interest in establishing, amending or

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[2] Discussion of the background and purpose of the fiduciary rules can be found in *Wood v. Commissioner*, 955 F.2d 908 (4th Cir. 1992), which this Court cited with approval in *Commissioner v. Keystone Consolidated Industries, Inc.*, 113 S. Ct. 2006 (1993), saying, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."

terminating a plan – a fact of life that would be incompatible with a fiduciary duty to act solely in the interest of the participants in the plan.[3]

With the exception of the decision below, every court of appeals to consider the question has wisely concluded that creating, amending and terminating a plan are not fiduciary functions at all but are settlor functions. Not being fiduciary functions, they are off limits from the fiduciary rules of ERISA, including the prohibited transaction rules. Thus, every other circuit has avoided painting itself into the corner where these settlor functions would be subject to fiduciary rules that would make them impossible to perform. The U. S. Department of Labor, the agency with authority to interpret and apply the fiduciary rules of ERISA, firmly and unequivocally agrees, as noted in the petition.

The decision below, contrary to all the other circuits that have considered the question, concludes that amending an employee benefit plan *is* subject to the fiduciary rules of ERISA, particularly the prohibited transaction rules.[4] Having painted itself into a corner, however, the

[3] The language and structure of ERISA are replete with indications of the understanding (and approval) of Congress that employers act in their self interest in designing, amending and terminating plans. To take one prominent example, in section 203 of ERISA, 29 U.S.C. § 1053, Congress permitted employers to impose a vesting requirement in a pension plan – a requirement that an employee work for the employer for at least a minimum number of years before becoming entitled to a pension. Vesting requirements obviously serve the interest of the employer, not the employee, but are permitted without being tested against any fiduciary standard.

[4] Since, by the express terms of ERISA section 406(a), a prohibited transaction occurs only where a *fiduciary* causes a

decision below compounds the error by mangling the prohibited transaction rules in order to escape. Implicitly recognizing that the prohibited transaction rules of ERISA *as written* would absolutely prohibit virtually all amendments to pension plans (under its theory that amendments are subject to those rules), the decision below simply ignores the absolute prohibition established by Congress and instead invents a new, variable standard: an amendment is prohibited if the benefit to the employer is more than "incidental" but not if the benefit is merely "incidental."

Aside from the simple conclusion that the decision below is wrong, therefore, the effect of the error is to obliterate the *bright line* test established by Congress and substitute a judgment of *degree* that requires particularized inquiry into the facts and circumstances of every individual case. As a result, employers will be uncertain whether a proposed amendment to a plan would be a prohibited transaction. Plan administrators, as fiduciaries, will be uncertain whether to recognize amendments as lawful. Participants in the plans will have a new and potent weapon to attack amendments (or portions of amendments) that are not to their liking. And the federal courts will be forced into the business of examining

plan to enter into a transaction, the decision below, by finding a violation of section 406(a), necessarily includes the conclusion that Lockheed acted as a fiduciary in amending the plan. Footnote 5 in the opinion below should not be understood to the contrary. It recites only that the court of appeals did not rule on a separate claim under a different section – a claim that Lockheed generally acted as a fiduciary and therefore was subject to the general fiduciary duties of section 404(a) (the prudent man rule, exclusive benefit rule, etc.).

amendments individually to determine whether the benefit to the employer is "incidental" or not. These are the very costs and burdens that Congress sought to avoid with a bright line test.[5]

Some elaboration on the effects may be helpful to appreciate the importance of the error below. There should be no doubt that virtually all amendments to plans benefit the employer, at least indirectly. After all, employers are not eleemosynary institutions; they pay wages and benefits in order to gain a benefit for themselves.

The benefit to the employer may be simple labor. Or the benefit to the employer may be more elaborate. For example, an employer with a pension plan might amend the plan to add early retirement benefits in order to attract employees from competitors whose pension plans offer early retirement. Or an employer might amend a pension plan to increase pension benefits in lieu of an increase in wages. Or an employer facing a strike and charges of unfair labor practices might settle the strike by agreeing to amend its pension plan to improve pension benefits. To varying degrees, the employer always benefits from amending a plan – by getting labor, by attracting talented employees from its competitors, by relieving pressure for higher wages, or by settling a strike and unfair labor practice charges, just to cite a few examples.

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[5] The analysis of the court of appeals applies to all employee benefit plans covered by ERISA that have assets, that is, almost all pension plans and some welfare plans. According to the U. S. Department of Labor, there were 730,106 pension plans alone covered by ERISA in 1988. *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 602.

If plan amendments really were subject to the fiduciary rules of ERISA, and a prohibited transaction were a question of degree (as the decision below holds), an employer would hesitate to amend its pension plan, even to raise benefits – a result clearly at odds with the intent of Congress in ERISA to encourage pension plans to provide retirement security for employees. The only safe course for the employer would be to freeze or terminate the existing plan and start a new plan that embodied the desired plan amendment.[6] But it cannot have been the intent of Congress to force upon employers such an unnecessary and wasteful exercise as freezing the existing plan (and then running the frozen plan and the new plan simultaneously), or else terminating the existing plan, just to make an amendment.[7]

Consider the problem from the point of view of the plan administrator. As a fiduciary under ERISA, the plan

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[6] Respondent and his *amici* in the court below all agreed that the act of creating a new plan cannot involve a prohibited transaction, even on their theory that amending a plan involves the fiduciary rules of ERISA, because a new plan has no assets until after it is established. Thus, they agreed that a new plan could have the very feature that, if added to an existing plan, would constitute a *per se* prohibited transaction under ERISA. Common sense rebels at this bizarre dichotomy, which finds no basis in ERISA, but if it is the law, employers will be forced to make use of it, as described in the text.

[7] Since ERISA does not require welfare plans to be funded at all, those employers which have chosen to enhance the security of the benefit. by funding them would find that they are hamstrung by the decision below, whereas there would be no problem if the plan were unfunded. Ironically, therefore, the decision below, which pays lip service to increasing the security of employees in their benefits, would exert irresistible pressure on employers to abandon funding of their welfare plans.

administrator has a duty not to give effect to plan amendments that constitute prohibited transactions. ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). But the plan administrator would be uncertain whether any particular amendment benefits the employer to the degree where it becomes prohibited, and the plan administrator would be ill equipped to make the necessary investigation and judgment.[8] Moreover, the plan administrator would face personal liability under ERISA for deciding that question wrong. If the plan administrator implemented a plan amendment, for example, and it was later determined that the amendment was void as a prohibited transaction under ERISA, the plan administrator could be personally liable to make the plan whole for all benefits paid under that amendment. ERISA section 409, 29 U.S.C. § 1109.[9]

There is even worse news from the perspective of the federal judiciary. In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to whether particular

[8] This would be all the more true where the plan is administered by an independent third party known as a "third-party administrator." A third-party administrator's expertise is in day-to-day administration of plans; typically, the third-party administrator has little knowledge of the employer's business. It would be fanciful to expect third-party administrators to judge whether plan amendments benefit the employer more than "incidentally" and are therefore void as prohibited transactions.

[9] This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or capricious" standard of review. The validity of a plan amendment under the prohibited transaction rules of ERISA would be a question of law as to which the plan administrator receives no deference.

amendments are lawful or, instead, are prohibited transactions. This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

The need to seek a declaratory judgment will be heightened by considerations of forum-shopping. As the petition points out, *challenges* to amendments can be brought in the Ninth Circuit with respect to employers nationwide, given the interstate reach of many employee benefit plans and the liberal venue and universal service of process provisions of ERISA. To protect themselves against such forum-shopping, administrators of plans nationwide will be forced, as a practical matter, to launch pre-emptive strikes – declaratory judgment actions seeking to *validate* amendments – in the circuits that disagree with the Ninth.

Needless to say, whether due to a challenge or in an action for declaratory judgment to validate an amendment, enmeshing the federal courts in analyzing the degree of benefit to an employer from each amendment represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

In sum, as to the first question presented, this case presents a picture strikingly similar to what the Court saw last term in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995). In *Curtiss-Wright*, a plaintiff dissatisfied with the employer's legal authority to amend a plan concocted the extreme new theory that the standard language in plans, reserving to employers the authority to amend the plan, is legally insufficient under ERISA, thus

casting doubt on the validity of nearly all plan amendments adopted since ERISA and creating an entire new class of ERISA litigation as participants and plan administrators litigate the validity of individual plan amendments. Apart from the legal theory for invalidating the plan amendments, this case is the same.

The shock wave in *Curtiss-Wright* was shaped a little differently from this case. *Curtiss-Wright* applied to both pension and welfare plans but had mainly retroactive effect. (Prospectively, an employer could solve the *Curtiss-Wright* problem by modifying the amendment language in the plan.) This case applies mainly to pension plans but has both retroactive and *unlimited prospective* effect. Here, the source of the problem is not plan language, which the employer can modify, but the statutory provisions regarding prohibited transactions, which will continue to apply to (and call into question) future pension plan amendments, if the decision below stands.

Over-all, the destructive force of the decision below on employers, plans and the federal judiciary is comparable to the court of appeals decision in *Curtiss-Wright*, particularly because of the open-ended prospective effect. In *Curtiss-Wright*, the Chamber urged the Court, in unusually strong terms, to accept the case and reverse the decision, and it did so. We respectfully urge the same in this case as to the first question presented.

II. AS TO THE SECOND QUESTION PRESENTED, RETROACTIVE APPLICATION OF OBRA '86 PRODUCES A MULTIPLIER EFFECT THAT WOULD IMPOSE SERIOUS FINANCIAL BURDENS ON PLANS FAR BEYOND ANYTHING THAT CONGRESS INTENDED.

The decision below gives retroactive effect to statutory provisions as to which Congress clearly expressed its

intention that application be prospective only, as explained in the petition, thus bringing the decision below into conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). The Chamber would like to underline the retroactive nature of the decision below and point out the serious consequences for defined benefit pension plans, where retroactivity produces, not a marginal increase in liability, but a multiplier effect.

The key to this issue is understanding how benefits accrue under a defined benefit pension plan. With a few exceptions not relevant here, benefits accrue ratably over the period that the employee participates in the plan. For example, a typical pension plan might provide a monthly benefit at retirement of $50 multiplied by the number of years that the employee has participated in the plan. If an employee works 30 years and retires, his monthly pension is $1,500. In this example, the employee's pension has accrued ratably over 30 years, at a rate of $50 per year.

There is obvious logic to accrual of pensions ratably over the working life of the employee, since the amount of pension is roughly proportional to the amount of work that the employee has performed for the employer. This result is not only reasonable and fair, however; it is the law. ERISA expressly requires that, for each year of participation in the plan, an employee accrue a ratable share of his ultimate pension benefit. ERISA section 204(b)(1), 29 U.S.C. § 1054(b)(1).[10]

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[10] Congress mandated ratable accrual of pension benefits under ERISA in order to prevent avoidance of ERISA's vesting requirement. The vesting requirement, as originally enacted, called for all participants in pension plans to become fully

Since length of participation in the plan generally determines the amount of pension, ERISA closely regulates the matter of when employees begin participation in pension plans. ERISA section 202, 29 U.S.C. § 1052. Among the original participation rules, ERISA expressly permitted a plan to exclude from participation employees who were hired less than five years before normal retirement age. (Since normal retirement age is typically 65, this permitted the typical plan to exclude employees hired after age 60.)

ERISA permitted this exclusion of employees hired after age 60 for a very specific reason. Pensions are generally funded over the working life of the employee. For most employees, that means a period of decades, which permits the plan to accumulate the necessary assets gradually over many years. On the other hand, if an employee could join a plan and retire just one or two years later, it would impose a large, unexpected liability on the plan, which the plan would be unable to finance over a long

vested in their "accrued benefit" after 10 years of service (or according to two alternative schedules). ERISA section 203(a)(2), 29 U.S.C. § 1053(a)(2). For an employee who joined a plan at age 25, 10 years would represent one quarter of his anticipated period of participation of 40 years, assuming he stayed until age 65.

Congress anticipated that an unscrupulous employer might provide only token accrual of benefits during the early years of an employee's participation in plan, so that employees might become vested but only in trivial pension benefits. To give meaning to the vesting requirement in section 203, therefore, Congress went on immediately in section 204 to require that pension benefits accrue ratably over the employee's period of participation in the plan. In this way, the employee in our example, who becomes vested after 10 years of participation, becomes vested in a substantial benefit – one quarter of his normal retirement benefit.

working life. Accordingly, Congress permitted plans to exclude such employees altogether.[11]

In accordance with ERISA, the Lockheed plan, like many others, lawfully excluded from participation employees who were hired within 5 years before normal retirement age. As a result, when Mr. Spink was hired in this case in 1979 at age 61, he was lawfully excluded from the pension plan. Since he did not participate, he did not accrue any benefit under the plan.

In 1986, Congress changed ERISA so that pension plans could no longer exclude employees from participation merely because they were hired after a certain age. Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), section 9203(a), 100 Stat. 1979 (1986). Congress said that the change in the law applied "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA '86, section 9204(b), 100 Stat. 1980 (1986). It is difficult to imagine a clearer specification of prospective effect.

Accordingly, when OBRA '86 took effect with respect to the Lockheed pension plan in 1988, Mr. Spink became entitled to participate in the Lockheed pension plan, but "only with respect to service performed on or after such date." The plan was duly amended to provide that Mr. Spink was permitted to participate on the OBRA '86 effective date, and he did in fact begin to participate in the plan in 1988. Since the amount of benefit depends on the length of participation in the plan, Mr. Spink's benefit was thereafter calculated by reference to the length of his

[11] *See, e.g.*, H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 262 (1974), and H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 46 (1974).

actual participation in the plan, that is, from and after the effective date of OBRA '86 in 1988.

What Mr. Spink sought, and the court of appeals granted him, was credit for the period from his hiring to the effective date of OBRA '86 – from 1979 to 1988. It is a historical fact that Mr. Spink was excluded from the plan during those years – that is, he did not in fact participate in the plan – and no one challenges the legal conclusion that such treatment was lawful when it occurred. By holding that OBRA '86 requires that credit be granted for that period, the decision below effectively makes unlawful today an exclusion that was lawful when it occurred, and therein lies the retroactivity. The decision below treats Mr. Spink the same as if OBRA '86 had been the law ever since ERISA was passed.

The rationale given in the opinion below relates to a different provision of OBRA '86. Having assured all employees of the right to participate in a pension plan regardless of old age, Congress wanted to assure that they would continue to accrue benefits regardless of age. So, in a separate provision of OBRA '86, it prohibited any plan provision cutting off accrual of benefits because of age. And, anticipating that an unscrupulous employer might avoid that prohibition by merely reducing the rate of accrual (rather than cutting it off entirely), Congress added that the same prohibition applied not only to "the cessation of an employee's benefit accrual" but also to "the reduction of the rate of an employee's benefit accrual" because of age. OBRA '86, section 9201, amending section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(i)(1).

For example, if employees accrue pension benefits under a plan at a rate of $50 per year of participation, it is unlawful for a plan to provide that the rate of accrual is

reduced to $10 for years of participation occurring after age 65. That provision has no application to Mr. Spink, of course. Under the Lockheed plan, the rate of accrual does not change merely because the participant reaches any age. Mr. Spink's rate of accrual was the same at all times and, furthermore, the same as all other participants in the plan, both under and over age 65. If anything, his rate of accrual *increased* by reason of his joining the plan – going from zero (when he did not participate) to the regular rate of accrual under the plan (when his participation began). Since the plan does not provide any reduction in rate, and Mr. Spink did not suffer any reduction in rate, the OBRA '86 ban on plan provisions reducing the rate of accrual by reason of age clearly has no application to this case and certainly cannot be used to justify retroactive application of the rule that older employees be permitted to participate from and after 1988.

The effect of the decision below on pension plans is immediate and severe. OBRA '86 already imposed an unexpected, new liability on pension plans when it required that employees hired after age 60 be permitted to participate prospectively. Remember, in 1974, when ERISA was enacted, Congress considered the financial burden from such a requirement too great and, accordingly, enacted the exception for employees hired within 5 years of normal retirement age. In OBRA '86, Congress changed its mind and decided to impose that burden on pension plans. Thus, even *prospective* application of OBRA '86 creates a new financial burden on plans, but there is no doubt that Congress chose to impose that burden – prospectively.

The decision below compounds the burden by its retroactivity: not only must pension plans accept the older employee as a participant and fund his pension

over a short period of time, under the decision below the pension must be inflated by taking into account the prior period when the employee did not in fact participate. For example, suppose that an employee was hired in 1983 at age 60 and was excluded from the pension plan. In 1988, OBRA '86 takes effect and he joins the plan. In two more years, he retires. Applying OBRA '86 prospectively, he has two years of participation. Applying OBRA '86 retroactively (in accordance with the decision below), he has seven years of participation. That means he receives more than triple the benefit, and the financial burden on the plan is more than three times greater, than if OBRA '86 were applied prospectively.[12]

The absolute dollars associated with this multiplier effect are very substantial. Using the same example, the monthly pension of our sample employee at retirement would be $100 if OBRA '86 were applied prospectively (2 years of participation at an accrual rate of $50 per year) versus $350 if OBRA '86 were applied retroactively (7 years at $50). Using the rates promulgated by the Pension Benefit Guaranty Corporation for valuing annuities, the value of a $100 monthly pension was $9,225 in 1988 and of a $350 monthly pension was $32,287. The difference – $23,062 – would have been the increase in cost to the plan in 1988, for just this one employee, if OBRA '86 had been applied retroactively. Today, eight years after OBRA '86 took effect, the cost of retroactive application is $53,433 – considerably more than double that amount.

[12] This is a modest example. The multiplier effect is even greater in the case of Mr. Spink himself, who had approximately 9 years of service before the OBRA '86 effective date and only a year and a half afterward, yielding a multiplication factor of more than seven.

While we are not aware of data showing exactly how many employees would be affected by retroactive application of OBRA '86 nationwide, the order of magnitude certainly can be estimated. According to the U. S. Department of Labor, in 1988 there were 32,166,000 participants in private, single-employer, defined benefit pension plans.[13] Multiply that by 37 percent to estimate the number of participants in plans that took advantage of the original ERISA provision permitting exclusion of employees hired after age 60.[14] Multiply that by the ratio of affected individuals to total participants, using the Lockheed plan as an example, and the estimate would be over 32,000 individuals affected nationwide.

If the cost of retroactive application of OBRA '86 for a typical participant were $53,433 today, the total cost nationwide could therefore be as high as $1.7 billion today. Even if the actual cost were half the estimate, it could still be fairly characterized as very substantial – certainly substantial enough that Congress should not be found to have imposed it on the nation's pension plans absent a clear intent to do so, in accordance with *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

In summary on the second question presented, the decision below not only commits error but does so in a way that dramatically multiplies the liability, resulting in a financial burden on plans far greater than Congress

[13] *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 603.

[14] This percentage is derived from a published survey of the largest salaried pension plans of 50 of the largest manufacturing companies in the United States in 1988. *Top 50 – A Survey of Retirement, Thrift, And Profit Sharing Plans Covering Salaried Employees of 50 Large U. S. Industrial Companies as of January 1, 1988*, The Wyatt Company (1988).

could ever have envisioned from the prospective application that it clearly set forth in OBRA '86. This Court's review is urgently needed.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers and plans, and the time has come to do so again.

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